



December 12, 2005

Highlights of the Conference Report to Accompany H.R. 3199, the USA PATRIOT Improvement and Reauthorization Act of 2005

On December 8, the Conference Report, H. Rpt. 109-333, was filed.

Noteworthy

- The House intends to vote on the Conference Report to H.R. 3199 on Wednesday, December 14. If passed, the Majority Leader intends to proceed promptly to its consideration in the Senate.
- The Senate passed H.R. 3199 by unanimous consent on July 29, 2005.
- The Senate-passed bill contained four titles: 1) reauthorization of the USA PATRIOT Act ("Patriot Act"); 2) enhancements to death penalties for terrorists; 3) measures related to seaport security; and 4) provisions to combat terrorist financing. The Conference Report preserves the title headings in the Senate bill, and adds three additional ones: Title V contains miscellaneous provisions relating to the Department of Justice; Title VI addresses the Secret Service; and Title VII adds the Combat Methamphetamine Epidemic Act of 2005.
- The Conference Report permanently tears down "the wall" that prevented information-sharing between law enforcement and the intelligence community prior to 9/11, as well as 13 other Patriot Act provisions that will otherwise expire on December 31, 2005.
- The Conference Report retains the Senate bill's 4-year sunsets for § 206 (roving wiretaps), § 215 (business record warrants), and the "lone wolf" terrorist law. The House bill had 10-year sunsets.
- The Conference Report adds substantial new civil liberties protections relating to § 215 (FISA business record warrants), § 206 (roving wiretaps), § 213 (delayed notification warrants), and National Security Letters.

Highlights of Title I: Patriot Act Reauthorization

New Sunsets

- On December 31, 2005, sixteen Patriot Act provisions will expire, including § 203, which allows the sharing of intelligence information in the war on terror.
- The Conference Report creates a new 4-year sunset for § 206 (“roving wiretaps”) and § 215 (FISA warrants for business records). (Each of those provisions is discussed in the sections below.) The Conference Report also creates a new 4-year sunset for the “lone wolf” authority enacted in the Intelligence Reform Act of 2004.
- The Senate bill had called for 4-year sunsets for these provisions. The House bill had called for 10-year sunsets on §§ 206 and 215, and did not sunset the “lone wolf” provision at all.

Changes to National Security Letters

- National Security Letters (“NSL’s”) enable FBI agents to request certain communication records and financial information in terrorism and espionage investigations. NSL’s have been authorized for these limited purposes since 1986.
- The Conference Report makes changes to (a) the availability of judicial review for NSL’s, and (b) the prohibition on disclosure to third parties.

Increased Judicial Review. Current law is ambiguous as to whether an NSL recipient has the right to move to quash the NSL. The Conference Report guarantees this right to judicial review and allows courts to modify or set aside the NSL “if compliance would be unreasonable, oppressive, or otherwise unlawful.”

Relaxed Disclosure Standards. Under current law, the recipient of an NSL may not disclose the contents of that NSL to third parties. The Conference Report permits disclosure to counsel, although the recipient of the request will, under certain circumstances, be required to identify an attorney he has already consulted. The Conference Report prohibits disclosure to other persons if an enumerated high-ranking Justice Department official certifies that doing so would “endanger the national security of the United States.” A person who knowingly makes an unauthorized disclosure with the intent to obstruct justice will be subject to criminal penalties. The Conference Report gives the recipient the right to challenge a nondisclosure requirement in court.

Changes to § 206 — FISA Multi-Point or “Roving Wiretaps” Authority

- The Patriot Act empowered the FBI to ask the “FISA Court” to obtain “multi-point,” or “roving,” wiretaps. These wiretaps are necessary for situations in which suspected terrorists are using multiple cell phones and communication devices to evade detection,

but where the identity of the persons are unknown. (The “FISA Court,” composed of Senate-confirmed Article III judges, was created by the Foreign Intelligence Surveillance Act.)

- The Conference Report requires these wiretap requests to be more specific, including identifying information regarding the individual being monitored, even if the exact identity is not known. The purpose of this change is to ensure that a particular wiretap authority is not construed so broadly as to allow surveillance of a large class of persons.
- The Conference Report also requires “specific facts in the application” showing that the target’s actions may thwart surveillance efforts.
- The Conference Report requires increased reporting by the FBI to the authorizing court with regard to how a particular wiretap authorization is being implemented.
- The Conference Report also adopts the Senate bill’s requirement of greater disclosure to Congress with regard to the use of this authority.

Changes to § 213 — Delayed Notification Warrants

- Under the Patriot Act, a federal court may, when issuing a search warrant, delay notifying the search target as to the issuance of the warrant. Law enforcement sought this authority in order to investigate ongoing conspiracies and criminal activities without alerting the criminals that they were being watched.
- According to the Department of Justice, the typical delay before notification is approximately one week, even though the Patriot Act did not set a statutory time limit on how long the government could wait to notify the target.
- The Conference Report would require notice to the target within 30 days of the warrant’s execution, unless the facts justify a later date certain. The Senate bill had a 7-day limit; the House had a 180-day limit.
- The Conference Report permits a longer delay if the government gives the court an “updated showing” of the need for more delay. This provision was in the Senate bill.
- The Conference Report includes the Senate-passed bill’s new public reporting requirements that are designed to enhance congressional oversight.

Changes to § 215 — FISA Warrants for “Business Records”

- Section 215 of the Patriot Act allows the FBI to seek court orders from the FISA court to obtain business records in intelligence and terrorism cases.
- The Conference Report requires the FBI’s application for a § 215 order to include a “statement of facts” showing “reasonable grounds to believe that the records or other things sought are relevant to an authorized investigation” involving international terrorism or espionage. (The current § 215 language does not contain an express “relevance” standard.)
- Under the Conference Report, materials sought under § 215 are “presumptively relevant” if they pertain to (1) a foreign power or its agents, (2) the activities of a “suspected” agent

of a foreign power under investigation, or (3) “an individual in contact with, or known to, a suspected agent of a foreign power” who is under investigation. This provision was added in order to mitigate concerns about government “fishing expeditions.”

- The Conference Report allows recipients of FISA warrants to consult legal counsel and seek judicial review. It also requires that all requests for such warrants be approved by high-ranking officials in the FBI, and that the FBI craft procedures to minimize the retention and dissemination of materials gathered with this authority.
- The Conference Report requires the Department of Justice’s Inspector General to conduct two audits of the FBI’s use of § 215, and also adopts the Senate bill’s requirement of enhanced reporting to Congress with regard to the use of this authority. The Conference Report also requires public reporting with regard to the aggregate use of this authority.

New Congressional Oversight and Public Reporting Provisions

As detailed above, the Conference Report contains a number of new provisions for congressional oversight and public reporting. They include the following:

- Sunshine on the Use of National Security Letters. The Conference Report requires a new annual, public report on the aggregate number of requests for NSL’s.
- Sunshine on FISA Multipoint “Roving” Wiretaps. The Conference Report adopts the Senate bill’s requirement of greater disclosure to Congress regarding the use of this authority, including descriptions of criminal cases in which it was used.
- Sunshine on Delayed Notification Warrants. The Conference Report requires a new, annual report to Congress regarding the aggregate number of times that delayed notification authority has been exercised.
- Sunshine on FISA Warrants for Business Records. The Conference Report requires the Department of Justice’s Inspector General to conduct two audits of the FBI’s use of § 215 and requires reporting to Congress with regard to the use of this authority. In addition, the aggregate use of § 215 warrants must be made public.
- Sunshine on “Emergency Physical Searches.” The Conference Report requires annual reporting to Congress with regard to “emergency physical searches” (conducted pursuant to section 304(e) of the Foreign Intelligence Surveillance Act).
- Sunshine on Internal Affairs at U.S. Citizenship and Immigration Services. The Conference Report requires a semi-annual report to Congress regarding internal affairs operations at this agency.
- FISA Court Oversight. The Conference Report requires the FISA Court to adopt rules and procedures to administer this bill and to provide a report to the Senate Judiciary Committee on the rules adopted.
- Additional Oversight of Emergency Communication Disclosures. Section 212 of the Patriot Act authorizes emergency, voluntary disclosure to the government of certain information from telecommunications entities. The Conference Report requires new reports to be made to Congress regarding the use of this provision.

Mass Transit Provision

Section 110 of the Conference Report includes a “mass transit” provision that adds railcars, railways, railroad equipment, and railroad infrastructure to the list of mass transportation elements protected by the criminal provisions of the Patriot Act.

Summary of Remaining Titles

Title II – Terrorist Death Penalty Enhancement

- Subtitle A creates death penalty provisions for air piracy offenses resulting in death. It also expands the scope of the individuals covered by the post-release supervision provisions for convicted terrorists.
- Subtitle B *recodifies* the federal statutes governing taxpayer funding of counsel for convicted capital murderers in state court.
- Several new death penalty-related provisions that appeared in the House-passed version of this bill have been *eliminated* in the Conference Report, including provisions titled “Terrorist Offenses Resulting in Death,” “Denial of Federal Benefits to Terrorists,” “Ensuring the Death Penalty for Terrorist Offenses Which Create Grave Risk of Death,” and “Authorizing the Death Penalty for Terrorist Use of Dangerous Weapons.” Also eliminated were other House-passed death penalty procedural provisions.

Title III — Reducing Crime and Terrorism at America’s Seaports

This title is substantially similar to S. 378, the “Reducing Crime and Terrorism at America’s Seaports Act of 2005,” which was reported favorably by the Senate Judiciary Committee on April 21, 2005. It amends the federal criminal code to create or enhance criminal sanctions relating to the following:

- entry by false pretenses to a secure area of a seaport;
- failing to obey an order to “heave to” by an authorized federal law enforcement officer;
- forcibly interfering with an authorized law enforcement action or providing materially false information during a boarding;
- willfully disabling a passenger vessel;
- transportation of dangerous materials and terrorists;
- destruction of vessels and maritime facilities;
- theft of interstate or foreign shipments or vessels;
- stowaways on vessels or aircraft;
- bribery affecting port security; and
- smuggling goods from the United States.

Title IV — Combating Terrorist Financing

This title increases penalties for different forms of terrorism financing and creates new predicates for the federal money-laundering statute, 18 U.S.C. § 1956. It also addresses money laundering through “hawala” networks — remittance systems sometimes used by terrorists for financing purposes.

Title V — Miscellaneous Provisions

- Sections 501 and 502 make changes to the appointment and duties of United States Attorneys.
- Section 503 adds the Secretary of Homeland Security to the line of Presidential Succession.
- Section 504 makes the Director of the Bureau of Alcohol, Tobacco, and Firearms a Presidential appointment with Senate confirmation.
- Section 505 clarifies the qualifications for U.S. Marshals.
- Section 506 creates an Assistant Attorney General for National Security, a Senate-confirmed position, as head of a newly created National Security Division.
- Section 507 grants the Attorney General the authority to certify whether a state is in compliance with post-conviction counsel requirements for federal habeas cases challenging state convictions, with de novo review of his certification decision in the D.C. Circuit. It also relaxes the time constraints imposed on judges for deciding cases under chapter 154 of title 28 of the U.S. Code.

Title VI — Secret Service

This title contains the text of S. 1967, the “Secret Service Authorization and Technical Modification Act.” In part, it creates new crimes relating to interference with national security events and authorizes the Secret Service Uniformed Division as a distinct entity within the Department of Homeland Security.

Title VII — Combat Methamphetamine Epidemic Act of 2005

This title contains a combination of the House version of the Combat Methamphetamine Epidemic Act (H.R. 314) and the Judiciary Committee-reported version of the same legislation, S. 103. This title can be summarized as follows:

Restrictions on Retail Sales of Precursor Chemicals:

- Repeals the federal “blister pack exemption” that currently allows unlimited sales of pseudoephedrine pills;
- Classifies pseudoephedrine, ephedrine, and phenylpropanolamine (the major meth precursor chemicals) as “Scheduled Listed Chemicals” (SLCs);

- Imposes a daily purchase limit of 3.6 grams, and a monthly limit of 9.0 grams, for SLCs;
- Requires all SLC products to be sold behind the counter or kept in a locked cabinet;
- Requires purchasers of SLC products to show I.D. and sign a log book; and
- Imposes new restrictions on mail order, Internet, and “flea market” sales of SLCs.

Import and Wholesale Regulations:

- Authorizes import and domestic manufacturing quotas of SLCs to ensure no oversupply leads to diversion; and
- Closes a loophole in the regulation of the wholesale “spot market” for SLCs.

International Monitoring:

- Requires reporting of major meth precursor exporters and importers, and holds them accountable for their efforts to prevent diversion to meth production;
- Requires information from importers on the “chain of custody” from foreign manufacturers to U.S. shores of precursor chemicals; and
- Authorizes funding for cooperative efforts with Mexico to stop meth production in that nation.

Other Provisions:

- Toughens federal penalties against meth traffickers and smugglers;
- Toughens penalties against persons who cook or deal meth in the presence of children;
- Requires updates from the Department of Transportation and the EPA about whether meth lab chemical byproducts are covered by appropriate environmental regulations;
- Makes improvements to the drug courts program to ensure greater accountability, and authorizes new funding for the program;
- Authorizes the Meth “Hot Spots” grant program that provides assistance to state and local agencies in dealing with meth labs and trafficking; and
- Authorizes new grants to help states assist drug-endangered children, as well as addicted women with children.